(2)

Supreme Court, U.S.
FILED
SEP 28 1995
CLERK

SUPREME COURT OF THE UNITED STATES

MARK A. TURNER
Petitioner,
vs.
GENERAL MOTORS CORPORAT ION

THE B.O.C GROUP

BUICK OLDSMOBILE CADILLAC GROUP

JEFF RINGER

Respondent

Case No. 95-431

Petition for Writ of Certiorari to the Supreme Court of the United States

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PETITION FOR WRIT OF CERTIORARI

MARK A. TURNER
15556 STOLTZ ROAD
DIAMOND, OHIO 44412216/538-0424 **Counsel of Record**

SUPPLEMENTAL BRIEF, A DISTINCTION OF RACE AND RELIGION WERE THE BASIS AND MOTIVATION FOR THE DISCRIMINATORY TRANSFER

[redacted]

28 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Did General Motors and Judge David D. Dowd wrongfully concluded in their memoroandums and briefs, both the fact and issue that General Motors cited race and religion as the motivation for the involuntary transfer was not discriminatory towards the Plaintiff Mark Turner? .

A. Does the fact that Generaal Motors cited both race and religion before they transferred Mark Turner raise a genuine issue of material facts?

B. In comparasion to the Plaintiff's opposition to summary judgement brief memorandum with Magistrate Streepy's report and recommendation, did the magistrate wrongfully conclude that Jeff Ringer was discharged, when General Motors Counsel and the Plaintiff's Counsel concluded in thier briefs through depositions, that he was only disciplined for 1 week and then reimbursed with a clear record?

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PARTIES TO THE PROCEEDINGS

The Petitioner, Mark A. Turner
15556 Stoltz Road
Diamond, Ohio 44412

The Respondent, (1) General Motors Corporation (2) B.O.C. Group, (3) Buick Oldsmobile Cadiallac (4) Jeff Ringer

JURISDICTION

On 6/9/95 THE U.S. COURT OF APPEALS FOR THE 6 CIRCUIT denied the appeal 94 3215, this court has jurisdiction to review the decsion by writ of certiorari under 28 U.S.C.A.

APPLICABLE STATUTORY PROVISIONS

I. This is a civil rights action to vindicate rights secured by Title VII of the Civil Rights Act of 1964 (42 U.S.C. Section 2000e seq) ; and chapter 4112 of the Ohio Revised Code. Jurisdiction is conferred upon this court by 42 U.S.C. Sections 2000e-(f)(3), 28 U.S.C. Sections 1331 and 1343, and its pendent jurisdiction.

INDEX TO APPENDIX

A. 1. Partial excerpt from Judge Davis D. Dowds memorandum and opinion US District Court Norther District of Ohio (Akron) filed 2/10/94 proceedings no. 131 civil docket 91-CV479

A. 2. Partial excerpt from the deposition of Mr. Kenneth Click, David R. Burton & Associates, certified stenotype reporters 614 Stambaugh Bldg., Youngstown, Ohio 44503

A.3 Memorandum in suupport of plaintiffs objection to report and recommended decision of Magistrate Judge filed on1/1/94 in the U.S District of Ohio eastern division,Akron Ohio case no. 4:91CV479 Judge D.Dowd,Magistrate Streepy

A DISTINCTION OF RACE AND RELIGION WERE THE BASES AND MOTIVATION FOR THE DISCRIMINATORY TRANSFER

The Honorable Supreme Court Justice Clarence Thomas, said: "There is nothing affirmative about affirmative action programs", because they show racial preference to one group or segment of people in society and actually treat African Americans with inferiority. When General Motors Supervisory Counsel made a decision to transfer the Plaintiff Mark A. Turner from his regular working job in the windshield area, they cited both race and religion as the basis, criteria and motivation for the involuntary and discriminatory transfer. Extensive discovery, depositions, affidavits and a Ohio Civil Rights investigation, have all conclusively confirmed that labor representative John Brinko stated that " he was transferring Mark Turner to supervisor Jim Mass's line because he would get along better there because they were both Baptist ministers and the same color or black race". Jim Mass is an ordained Baptist minister of some 20 years and is African American discovery has concluded that General Motor's Supervisory Counsel and Labor Relations deliberately transferred Turner to Mass's area on 2 separate occasions making the racial and religious motivation for the transfer conclusive. General Motors also recruited a Baptist minister and deacon with a degree in religious studies who is

likewise a supervisor employed by General Motors by the name of William Fuller to encourage Turner to transfer to Jim Mass's area, this is a further indication to support the claim that race and religion was the contributing factor and motivation for the discriminatory transfer. If the Defendant company General Motors would have said they were just transferring Turner they possibly could have raised an objection to their motivation for the transfer, but they added a definite clause or article in the statement that preempted the transfer, labor rep. John Brinko cited both race and religion and then selected a supervisor that shared the identical ethnic background, African American and religion and vocation, a Baptist by denomination and ministerial vocation, making the Plaintiff's argument conclusive and proving a discriminatory animus ,General Motors displayed racial preference to one group or race of people and regarded African Americans with inferiority, simply because race was the determining factor in the decision to transfer Turner exclusively to Jim Mass. It would be difficult for a Judge or a jury to ignore the specific job placement and assignment to a supervisor of the Plaintiff's identical race and religion. Even if the Defendant Company could argue, as Judge Dowd confirmed that the move was for practical business reasons to alleviate a troublesome work area, the discriminatory actions would be definitely characterized by the selection to transfer Turner to a supervisor of his identical, same race and religion, thus

the Defendant Company cited race and religion as the motivation, substantiating the Plaintiff's contentions that the transfer was discriminatory. Finally Justice D. Dowd said in his memorandum and opinion, "that the company sought out Mass because Mass and the Plaintiff appeared to have so much in common his same color, race and religion", he is absolutely correct that was the company's motivation and actions, that's why the involuntary transfer must be conclusively regarded as racist and discriminatory, for race should not be an attributing factor or criteria for promotions and granting contracts as in affirmative action programs or a demotion and discriminatory transfer that adversely and racially effected the Plaintiff. Both General Motors and Justice David D. Dowd completely ignored in their memorandums and briefs that the Plaintiff Mark Turner was transferred not by the content of his character but by the color of his skin this was a cruel, unfair, mean spirited and apathetic way to judge and remedy a racially oppressive situation for a destitute minority and accommodate the bigotry racial biases and inequities of a predominately racial group. Distinctions founded upon race was abolished and color has been washed out of our American Constitution but both General Motors and Judge D. Dowd made these distinctions. In an attempt to justify and rationalize General Motors discriminatory conduct General Motors stated that they were transferring Turner for his health and welfare to

Jim Mass's line without taking any legitimate steps to eliminate the racially hostile atmosphere and Justice Dowd concluded in his memorandum that it was remedial ,The statement in itself is a predicate of discriminatory actions, why did General Motors supervision tolerate an uncontrolled work site, why were they so permissive about racial and religious harassment ,that the Plaintiff Mark Turner consequently was transferred. This inadequate remedy was not a legitimate non-discriminatory reason for the transfer it ratifyed and encouraged the illegitimate discriminatory behavior, General Motors and Judge Dowd radically concluded that eliminating Turner from the troublesome work area was reasonable from a business perspective but General Motors and Judge Dowd should have concluded that eliminating racism and discriminatory conduct from the troublesome work area was the only reasonable solution or remedy from a business perspective. Both General Motors and Judge D. Dowd have consequently turned Dr. Martin Luther King's dream for equality into a racist nightmare. The entire process of these entire litigation's, pre-trial and summary judgement have been a farcical because General Motors and Judge Dowd have completely ignored that the involuntary discriminatory transfer was based on the distinction of race which was abolished by the Civil Rights Acts which washed color out of the constitution. Therefore I ask the Supreme Court which has jurisdiction over the lower courts

to take remedial action to alleviate this racially oppressive situation.

By either:

1. **By hearing this case**
2. **By settling this case through arbitration**
3. **Remanding it to an expedited trial date**
4. **Or any other remedial solution the court deems**

5.oral argument

(Adarand construction vs. Pena,93-1841 supreme court decision)

REMBERING ROSA

Remembering Rosa Thirty five years ago there was a young black woman who after a long hard day of work was forced to give her bus seat to a white person and migrate to the back of the bus, an area designated for blacks, she refused and was imprisoned for it because she acknowledged the double standards and stood for her civil rights. I earnestly feel my personal situation is comparable to the racial dilemma that confronted Rosa Parks. (1) Rosa was forced to forfeit her bus seat to accommodate the racial bigotry that was pervasive in her day. She was treated with contempt, as a second class citizen, merely because of the pigmentation of her skin, likewise I was asked to forfeit my job in the glass area even though I had preference to it. My labor rep. told me I was being placed with someone of my same race and religion, just as blacks had to be grouped together in the back of the bus with the Montgomery Transit System. What are black people? a group of animals? Homosapeins? Who need to be

grouped together, categorized together according to their species, this was an insult not only to the black race but to the human race and made the constitution of the United States a complete mockery. Management made a physical distinction between race and class I was placed on the back of the bus, they treated whites with supremacy and blacks with degradation as second class citizens. God has created all men equal irregardless of race , national origin, or religious affiliation and it should make no difference who you sit or work next to. This was a civil injustice, a form of segregation which is illegal in this country (Brown vs. The Board of Education 1958.) Rosa was tantalized and subject to a cruel form of mental imprisonment and degradation, where she could visually and mentally observe whites in the bus seat that she deservedly had the rights to occupy. Physically she was forced against her will to move to the back of the bus, her freedom of choice was revoked and her rights infringed upon.

She suffered mental anguish, psychological hardship when from the back of the bus where she was situated she could visually perceive the bigotrous groups of whites who racially harassed her and despised the color of her skin, casually sitting in her bus seat I similarly experienced the same contempt she felt, when I see a white person with less seniority working the job that I rightfully deserve. It is false imprisonment when you see your oppressor having

liberality's, privileges and your company suppressing depriving the racial minority of his right to accommodate the racial bigotry and bias of the Plaintiff's co-workers. The moral dilemma in comparison with the bus seat and my job in the windshield area is not so much the tangible object of the bus seat or the windshield itself but my human and civil rights that they represent. My company has infringed upon, deprived me of my civil right and I want my bus seat, or my job in the windshield are BACK!

Racism is a cancerous malady that infects the spiritual body of America the only alternative we have to restore our health is surgery, no one wants to endure the painful trauma of surgery but it is necessary to restore our health, then after surgery there must be a healing process and the only suave to heal the surgical wounds is that when we realize, individually and collectively as free and democratic Americans, that the only race is the human race and then the healing process can begin.**(HARRIS V. FORKLIFT SYSTEMS,INC.114 S.CT. 367,371 (1993)**

Corporate and Judicial Tyranny

Frederick Douglas once said "The limits of tyrants are prescribed by the endurance of those whom they oppress, find out just what any people will quietly submit to and you have found out the exact measure of injustice which will be imposed upon them".

Argument at Law

General Motors transferred the Plaintiff Mark A. Turner with a distinction founded upon race and religion which is unconstitutional, they cited both race and religion for the motivation involving the transfer Judge Dowd ultimately had complicity with this immoral, unethical decision that infringed upon Turner's constitutional rights because race was the criteria General Motors cited and Justice D. Dowd had complicity with in his opinion and memorandum to initiate this racially motivated transfer. (See partial statement from Dowd's memorandum in the index).

(4s91 CV 0479) not show that it was offered as ."pretext for discrimination"). Significantly,

DOWD, J.

Mark A. Turner,

General Motors

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Plaintiff,) CASE NO. 4:91 CV 0479

)

) MEMORANDUM OPINION

Defendants.

! (Disposing of Docket No. 96)

I. INTRODUCTION

Defendant General Motors Corporations has filed a motion for summary judgment (Docket No. 96). This case was referred to a United States Magistrate Judge for a report and recommended

(A-1)

discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." St. Marcus Honor Center, 113 S.Ct. at 2752 (emphasis in original).

defendant's transfer of plaintiff in perspective. Plaintiff, and the Magistrate Judge, relied on a remark apparently made by John Brinko, the Labor Relations Representative, that plaintiff was being transferred to Jim Mass's work area because Mass was of the same color, race and religion as plaintiff and because Mass was also a minister. Brinko also told plaintiff that General Motors was concerned about his health and welfare. The Magistrate Judge concluded that these remarks raised a genuine issue

as to whether the transfer WAS impermissibly motivated. This Court finds to the contrary when the circumstances are viewed as a whole.

SEGMENT #4

Plaintiff was admittedly having trouble at his job site. He repeatedly complained about his co-workers; considerable time and effort were expended in response to his complaints. Finally, in AN EFFORT

improve his job conditions, his superiors decided to transfer him. Intent on finding a workplace for plaintiff where he could get along and not be picked on," they chose Mass' work

BECause Mass and plaintiff appeared to have SO much in common. This is a far cry from being motivated by impermissible, discriminatory

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:91 CV 419

MARK A. TURNER,	)	
	)	
Plaintiff	)	DEPOSITION
	)	
VS	)	OF
	)	
GENERAL MOTORS CORP., ET AL.,	)	MR. KENNETH CLICK
Defendants	)	

DEPOSITION taken before me, Joni Bryan, a Notary Public within and for the State of Ohio, on the 27th day of August A.D. 1992, pursuant to agreement, and at the time and place therein specified, to be read in evidence on behalf of the Plaintiffs in the aforesaid cause of action, pending in the United States District Court within and for the Eastern District of Ohio.

APPEARANCES

MR. IRA MIRKIN,
On Behalf of Plaintiff

MR. ROBERT S. WALKER,
On Behalf of Defendants

(A-2)

A No.

Q What terms have you used in the General Motors Plant when referring to black employees?

MR. WALKER: I object to that. It assumes that h has used any terms referring to black employees which is not established on the record.

MR. MIRKIN: Will you let him answer?

MR. WALKER: Oh, sure. Go ahead.

A I have good friends that are down there, and they're exceptional; and I would say something on the basis of, "Bring your black ass over here," and that's about it.

Q That's about it?

A Yeah.

Q Outside of work, what terms do you use when referring to blacks?

A - None. I have black neighbors. I don't believe i that.

MR. WALKER: That's all you have to say.

Q What problems did you -- getting back to one of m original questions -- what problems did you observe involvin Mark Turner in the windshield install area?

MR. WALKER: I'm going to object to breadth of that; but you can answer.

A Mark, when I was there, as a repairman, I seen

Mark as a guy that was not very quality-conscious on his job. If he fixed it, fine; and if he didn't, that's fine. And when I worked with him on the line, you know, and got first-hand, I felt that Mark was lazy, and he didn't care about the fellows, people that he worked with.

He did the job the way he wanted it done; and with the job that he was on, he couldn't do that because he worked with two other people.

Q Did you observe any --

MR. WALKER: Are you finished with your answer as to all problems that occurred?

It's fine if he has, and you want to follow up --

MR. MIRKIN: I assumed -- he stopped talking and looked at me -- I assumed he was done.

MR. WALKER: Sure.

Q Did you observe any friction between Mark and any of his co-workers?

A From the time I walked over there after the repair, okay, I noticed a friction that was there because of his religious aspect versus the other people, and their lifestyles.

Q What do you mean by that?

A Well, Turner was religious, and to a lot of people out there that are not, that's like a turn-off.

Q How did you know he was religious?

A Oh, he told you.

Q And how do you know that was a turn-off to the other people, to some of the other people in that department?

A Well, they kind of made faces.

Q Did they tell you that? In conversations with anyone, did they tell you that they found that to be a turn-off?

A No.

Q This is something you could observe?

A I just were so picked up when they made a face.

Q How did they -- let me rephrase that. Did they pick on Mark at all because of that?

MR. WALKER. Object to the form.

A No.

Q Now, Mark told you he was religious?

A Yes, sir.

Q Tell me about that conversation.

A Well, we just talked about families and his family and he told me they went to Sunday School, and by that it kind of led up to the aspect of him telling me that he was a minister. That was about it.

Q Did you have this conversation with him soon after you came into the department?

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

MARK A. TURNER CASE NO. 4:91CV479

Plaintiff JUDGE DAVID D. DOWD

(Magistrate Judge Jack B. Streepy)

vs -

GENERAL MOTORS CORP., et al

Defendant

MEMORANDUM~~IN SUPPORT OF PLAINTIFFS OBJECTIONS TO REPORT AND RECOMMENDED DECISION OF MAGISTRATE JUDGE

The Report and Recommended Decision of Magistrate Judge(Report) sets out the background of this dispute.Briefly,Plaintiff Mark Turner commenced this action againstDefendantGeneral Motors Corporatio~, Turner's employer. Turner's Complaint asserts eleven (11) causes of action including discrimination claims under federal and state law and pendent state tort claims.

Defendant General Motors moved for a summary judgment.The motion was submitted to Magistrate Judge Streepy. On December 22, 1993, the Magistrate issued a Report and Recommended Decision.

(A-3)

With one excepti on, the Magistrate recommended that the motion be denied with respect to the federal and state discrimination claims. Again with one exception, Magistrate Streepy recommended that the motion be granted with respect to the pendent state claims. Defendants' summary judgment motion should be denied in its entirety. Accordingly, Plaintiff Turner objects to the recommendation that the summary judgment motion be granted with respect to the second, fourth, sixth, seventh, ninth, tenth and eleventh causes of action set out in the complaint.

At the outset, the parties submitted exhaustive briefs to Magistrate Streepy. T!ie reasons why a summary judgment is not appropriate were explained in detail in Plaintiff Mark A. Turner's Memorandum in Opposition to Defendant General Motors Corporation's Memorandum for Summary Judgment.In addition to the arguments set out in the Memorandum,the Magistrate's Report merits these additional observations.

I. **THE COURT SHOULD NOT ADOPT THE MAGISTRATE1S RECOMMENDATION THAT A SUAMRY JUDGMENT' BE GRANTED WITH RESPECT TO THE RELIGIOUSLY HOSTILE WORK ENVIRON-**

MEN CLAIM IN THE SECOND CAUSE ACTION.

The Magistrate characterized the second cause of action as follows:

"His second cause of action alleges that GM tolerated and condoned a religiously hostile work environment, and discriminated against him on the basis of religion in involuntarily transferring him to another department.

(Report at p. I)

1These objections address the specific claims for relief asserted in the amended complaint. Plaintiff Turner believes that the Magistrate also erred with respect to several legal and factual. matters. For example, the Report states that when there is direct evidence of discrimination "The burdeii then shifts to defendants to articulate a legitimate, non-discriminatory reason for transferring plaintiff." (Report at p. 17). To overcome direct evidence of discrimination, the employer's burden is to prove, and not merely articulate, a legitimate, non-discriminatory reason. While we do not agree with this - and other - legal and factual conclusions, Plaintiff Turner is confident that the case will be decided at trial on the basis of the governing law and evidence presented rather than any error or mistake in the Magistrate' 5 Report. Accordingly, the Objections only address the Magistrate' 5 conclusions with respect to the various causes of action that the Magistrate recommended be dismissed.

2The Magistrate recommended that a summary judgment be granted in part with respect to this claim.

The Magistrate concluded that there was a genuine issue of whet]ler Plaintiff Turner' s transfer was motivated by religion.

The Magistrate' s Report states:

"...Brincko came down and told plaintiff hewas being moved to Jim Mass area. Brinckosaid that Mass was of the same color, race and religion as plaintiff, that Mass was also a minister, and there were other Christians in the department...

Plaintiff states that when Brincko told him he was being transferred to Mass' area, he emphasized that Mass was of the same race and religion as plaintiff." (Report at pp. Il, 17).

The Magistrate' s Report concluded:

"Vith reference to religion motivating the transfer, the aforementioned statement of Brincko, in combination with earlier efforts to induce plaintiff to voluntarily move to a new department, shows that there is a genuine issue whether religious bias motivated the transfer." (Report at p. IS).

However, the Magistrate inconsistently concluded that the summary judgment motion should be granted with respect to that portion of the second cause of action which alleges that Plaintiff Turner was subjected to a religiously hostile work environment.

The Magistrate summarily concluded that a summary judgment should be granted on this portion of the second cause of action:"The only incident that was arguably motivated by religious bias was when Porter told plaintiff to think about that' when he was preaching. This is insufficient to create an issue whether Turner was subjected to religiously hostile work environment." (Report at p. I6).

The Recommendation should not be followed.

First, on several occasions, the Defendant sought

to transfer Turner to work under a different supervisor on the basis of religioin, Turner' s Affidavit states:

> I ad earlier been encouraged to transfer to Mass department because he is black and a fellow Baptist Minister." (Turner Affidavit at para. 13).

The Magistrate' s Report noted that General Motors had earlier sought to transfer Plaintiff Turner. (Report at p. 8 and p. IS, note 9). At one point, Turner was pulled off the line to speak with a supervisor who is an ordained Deacon in the Baptist Church.(Turner Affidavit at para. II). This supervisor also urged Turner to transfer to another department (Turner Affidavit at para.

II) The Company' s continued efforts to transfer Turner because of his religion support the claim that Turner was subjected to a religiously hostile work environment.

The Magistrate concluded that: "The only incident that was arguably motivated by religiou5 bias was when Porter told plaintiff to think about that' when he was preaching. (Report at p. 16). The remark was hardly the only evidence of a religiously hostile work environment.

Plaintiff Turner is a Southern Baptist Minister. His strong religious views were well known by Turner's fellow employees. (Estes Dep. at p. 78). Kenneth Click, one of Turner's coworkers in the windshield install area, testified that "I noticed a friction that was there because of his religious aspect versus the other people. (Click Dep. at p. 29) Aware of Turner's religious views, fellow employees repeatedly directed profanity at him and placed Pornographic literature on his desk at work. Rather than one incident, Turner was subjected to repeated harassment because of his strong religiou5 views.

Company workers directed Profanity at Turner. The Magistra~~ notes this in his Report.

> Plaintiff testified that coworker Russ Howard, or Repairman Russ,' called him profane names and made an obscene gesture at him...
> Two coworker glass fitters, named Ron and John, also called Plaintiff obscene names
> Another -0worker...called Plaintiff obscene names.
> Kerish became angry, and began calling Plaintiff a crybaby and useing obscenities...tt
> (Report at pp 7, II).

The obscenities directed at Turner were not limited to coworkers.The Magistrate notes that Turner was referred to as a "motherfucker" by his supervisor.

(Report at p. 9)

The Magistra~~'5 Report states:

> "On another occasion coworkers Estes and Cameron repeatedly threw P0rnography on Plaintiff'5 desk. Plaintiff complained to Brown, who expressed an unwillingne55 to intercede, but said he would look into it. Nonetheless, the activity occurred on otheroccasions... (Report at pp 9, IO).

° Turi,er'5 coworkers ~ePeatedly 5ubject~~ Turner to P0rnographic material.

Plaintiff Turner' s co-workers, fully aware of Plaintiff `5 religiou5 views, 5ubjecte~ Turner to repeated obscenities and Pornography The Magistra~~' s recommendation that the court dismiss the religiously hostile work environment claim should not be followed. General Motors' repeated effort to transfer Turner because of his religion, and the employees subjecting Turner to repeated obscenities and P0rnographic material, Precludes a summary judgment on this issue.

II. THE COURT SHOULD NOT ADOPT THE MAGISTRATE'S RECOMMENDATION THAT A SUMMARY JUDGMENT BE GRANTED WITH RESPECT TO THE FOURTH AND SIN CAUSES OF ACTION ALLEGING THE VIOLATION OF PUBLIC POLICY UNDER OHIO LAW.

The public policy claims set out in the complaint should

not be dismissed for the reasons stated at page 70 of Plaintiff Mark A Turner's Memorandum in Opposition to Defendant General Motors' Memorandum for Summary Judgment. In addition to the authorities there cited, see also Pater v. Health Care and Retirement Corp., 808 F.Supp. 573, 579-580 (S.D. Ohio, 1992).

III. THE COURT SHOULD NOT ADOPT THE MAGISTRATE'S RECOMMENDATION THAT A SUMMARY JUDGMENT BE GGRANTED WITH RESPECt TO THE SEVENTH CAUSE OF ACTION ALLEGING THAT GENERAL MOTORS IS LIABLE FOR FAILING TO PREVENT OR STOP THE RACIAL AND RELIGIOUS HARASSMENT OF TuRnER.

The Magistrate also recommended dismissal of the seventh cause of action.The Report states:"Plaintiff's seventh cause of action alleges that GM is liable for the unlawful and offensive activities of plaintiff's coworke (but does not clearly state the predicat state law tort upon which respondeat superior liability is based). It was Previously noted that plaintiff states no seventh cause of action is based on his Ohio tort law claims.However, all of plaintiff s tort law claims, but for his claim against Ringer, should be dismissed (See III A to E, ~a), thus no predicate exists on which to attach resDondeat superior liability." (Report at p. 26).

The seventh cause of action asserts that Defendant Company is liable for its "failure to control" the harassment by Plaintiff' s co-workers, "when Defendant Companies knew or shou Id have known of thene employees propensities to engage in unlawful and offensive activities." (Amended Complaint at para. 45). This states a claim under Ohio law.

In Kerans v. Porter Paint Co., 61 Ohio St.3d 486 (1991), the Ohio Supreme Court reversed a summary judgment in favor of the employer defendant in a case arising out of sexual harassment. In that case, the employee claimed that she was sexually harassed at work and that her employer took no appropriate action to prevent or stop the wrongful conduct. The Court explained:

> "...an employer may be liable for failing to take appropriate action where that employ knows or has reason to know that one of it employees poses an unreasonable risk of har to other employees." 61 Ohio St.3d at 491.

The Court continued:

> "An employer has a duty to provide its employees with a safe work environment and, thus, may be independently liable for to take corrective action against an employ who poses a threat of harm to fellow employees, even where the employee's actions do not serve or advance the employer's business goals. Whether the employer has acted appropriately in a particular situation is a factual matter to be determined on a case by case basis. However, where an employer knows or has reason to know that one of his employees is sexually harassing employees, he may not sit idly by and do nothing." 61 Ohio St.3d at 493.

In this case, General Motors took no appropriate actions to prevent the abuse of Mark Turner. The Magistrate properly concluded that "There remains an

issue of fact whether GM took reasonable steps to remedy or prevent the racially hostile work environment." (Report at p. 16).

In Baab v. AMR Services Corp, 811 F. Supp. 1246 (N.D.Ohio 1993) this Court observed that in Kerans "The Ohio Supreme Court has recently changed the view of employer's tort liability from previously enunciated vicarious liability principles known to the common law." 811 F.Supp. at 1265. This Court explained:

> "In this court's view Kerans, rather than holding the employer liable for its own negligence, uses that negligence to establish vicarious liability for all torts of the employee predicated upon sexual harassment.In effect, the Kerans Court held that torts of coworkers predicated upon sexual harassment are within the scope of employment if the employer was negligent in not preventing that malfeasance." 811 F.Supp.at 1267.

Under Kerans, General Motors is liable under Ohio law for failing to prevent or stop the racial and religious harassment of Mark Turner. The Magistrate already concluded that an issue of fact exists concerning the appropriateness of the Company's response to Turner's harassment, and the same factual guestion precludes dismissal of the

seventh cause of action asserting General Motors liability under Ohio law.

In urging dismissal of the seventh claim, the Magistrate's Report concluded that if its recommendations are followed there would be no tort liability for which General Motors could be held ~icariously liable. A summary judgment should not be granted with respect to the other state law torts set out in the complaint. Thus, there are torts for which Defendant General Motors can be held vicariously liable. In any event, Defendant General Motors is liable for failing to stop its employees'harassment of Plaintiff Turner under Kerans. The seventh cause of action should not be dismissed.

IV. TIIE COURT SHOULD NOT ADOPT MAGISTRATE'S RECOMMENDATION THAT A SUMMARY ~MENT BE GRANTED WITH RESPECT TO THE NINTH CAUSE OF ACTION, ALLEGING RESPONDEAT SUPERIOR UNDER OHIO LAW.

The Magistrate recommended dismissal of Plaintiff `s respondeat superior claim set out in the ninth cause of action.Defendant Company is not entitled to a summary judgment dismissing this claim.

As explained in the Memorandum, under Ohio law

an employer can be held liable under the doctrine of respondeat superior when it rati fies the conduct of the employee even if the employee is acting outside the normal course of employment.General Motors ratified tlj° 1 ssaul of Mark Turner by employee Jeff Ringer by failing to di sch~rge Ringer for the assault.

Greg Brown, the supervisor of Turner and Ringer,concluded t]iat Ringer should be discharged, as did John Brincko,General Motors' Labor Relations Specialist, and Noel Neil,Supervisor of Labor Relations. (Brown Dep. at p. 41) (Brincko Dep. at p. 20), arid (Neil Dep. at pp 8, 36-38). Despite the recognition tliat the unprovoked assault merited Ringer' s discharge, Ringer was reinstated by the Company. By failing to discharge Ringer, the Company ratified his actions.The Magistrate' s Report states:

> "Moreover, continuing to employ those who have committed intentional torts is not a ratifti cation of the torts. See Dorsev v. Morris, 82 Ohio App. 3d 176 (1982) (summary judgment appropriate; continuing to employ supervisor w]ro threw object at plaintiff did not ratify supervisor' s action, where supervisor was susperided without pay until psychiatric help was sought)." (Report at I,. 26).

In the Dorsey,~ case, the employer did provide

meaningful discipline designed to prevent future misconduct. Here, Ringer received a token su<pension (Ia ter cleared from liis record) for conduct which the Company officials conceded requi.red discharge. Arid, rather than preveIiti ng future abuse of Turiier, the fai Iii re to di scharge Ringer invited continued l)arassment of Turner. T]rere is an issue of fact concerning General Motors' Ii abi Ii ty for Ringer' s assault, and a summary udgment sliou Id not be granted on this cause of action.

V. THE COURT SHOULD NOT ADOPT THE MAGISTRATE'S RECOMMENDATION THAT SUMMARY JUDGEMENT BE GRANTED WITH RESPECT TO THE TENTH CAUSE OF ACTION WHICH ALLEGES INTENTIONAL INFLICTION OF EMOTION DISTRESS UNDER OHIO LAW.

Plaintiff Turner's tenth cause of action alleged intentional infliction of emotional distress. A summary judgment granting that claim is inappropriate for the reasons stated at pages 67-70 of Plaintiff Mark A. Turner's Memorandum in Opposition to Defendant General Motors' Memorandum for Summary Judgment.

The Magistrate acknowledged that there was evidence in the motion papers showing a pattern of

harassment by coworkers and the inadequacy of General Motors' response. The Magistrate notes that "There is genuine issue whether the above noted working environment was unreasonably abusive or offensive" and "There remains an issue of fact whether GM took reasonable steps to remedy or prevent the racially hostile work environment." (Report at pp. I4, 16). The Magistrate recommended dismissal of this cause of action concluding that "The actions and inactions of GM simply did not rise to the level of creating an issue whether there was such extreme and outrageous conduct" that would support an intentional infliction claim. (Report at p. 24). The summary conclusion does not acknowledge the extensive pattern of harassment to which Mark Turner was subjected In the period of several months, Plaintiff Turner was subjected to the following

A male co-employee made sexual advances to Turner. The co-employee was not disciplined.Another o-employe assaulted and injured Turner. The co-employee was given a one-week suspension and his record was soon cleared.

- A dead snake was placed in Turner's

work rea.

- The tires of Turner's automobile were slashed in the General Motors parking lot.

- The lug nuts on the wheels were loosened while the car was parked in the General Motors lot.

- Turner was threatened by white co-employee John Karash.

- Turner was threatened by white co-employee Carl Cononico.

- Turner was threatened by white co-employee Ken Click.

- Turner was subjected to verbal abuse by white employees Earl Thompson, Russ Howard, and several others.

- Graffiti was written in the bathroom which read "Dark Mark sucks."

- Three posters were placed in the work area which read "Mark sucks", "Darky Marky" and "Dark Mark, the All American Loud Mouth."

- Pornographic material was placed in Turner's work station.

- The superintendent called Turner a "mother fucker" and co-employees used profane language in referring to him.

In the Report, at pages 4-11, the Magistrate notes that there is vidence of this pattern of harassment.

The Company stood by and invited and

allowed thisconduct to continue. The Company took no serious action to revent the harassment and it continued. (See Report at pp. 15, 16). Whether, in light of the pactern of harassment, the ompany's respo'ise was sufficiently outrageous to support an ntentional infliction claim is a jury issue. The court should ot conclude on a summary judgment motion that the conduct permitted by General Motors was not extreme and outrageous. See 11Pater v. Health Care and Retirement Corn., SOS F.Supp. 573 (S.D. Ohio, 1992).

The Kerans decision discussed above is also instructivehere. In that case, the plaintiff brought a claim against the mployer for failing to prevent work place sexual harassment. Thethird cause of action alleged intentional infliction of emotional istress. 61 Ohio St.3d at 487. The trial court granted summary udgment dismissing this claim. On appeal, the Supreme Court held that the trial court erred in dismissing the intentional nfliction claim. 61 Ohio St.3d at 494. As in Kerans, this Court hould not dismiss on a

summary judgment the intentional nfliction cause of action.

V. THE COURT SHOULD NOT ADOPT THE MAGISTRATE'S RECOMMENOATION THAT A SUAMARY JUDGMENT BE GRANTED WITH RESPECT TO THE ELEVENTH CAUSE OF ACTION `WHICH ALLEGES AN INTENTIONAL TORT UNDER OHIO LAW.

Under Ohio law, most tort claims by an employee against is employer are pre-empted by the workers' compensation laws. Inblankenship v. Cincinnati Milacron Chemicals. Inc., 69 Ohio St.2d 608 (1982), the Ohio Supreme Court held that an employee could sue is employer for an intentional tort.The eleventh cause of action sets out an intentionaltort claim under Ohio law. Summary judgment should not be granted ith respect to this cause of action for the reasons stated at pages 71 and 72 of Plaintiff Mark A. Turner' s Memorandum in pposition to Defendant General Motors' Memorandum for Summary judgment. The Magistrate disagreed. He recommended dismissal ofthis cause of action.

Plaintiff's eleventh cause of action alleges claim pursuant to Ohio Revised Code Section 4121.80. The Supreme Court of Ohio has found that statute unconstitutional in toto as exceeding and conflicting with the

legislativeathority granted to the General Assembly pursuant to Sections 34 and 35 of Article II of the Ohio Constitution. Brady v. Safety-Kleen Cornoration, 61 Ohio St.3d 624 (1991) (Syllabus, para. 2). Thus defendants are entitled to summary judgment on this claim." (Report at p. 23).

The Magistrate erroneously focused on Ohio Revised Code Section 120.80 and not the intentional tort asserted in the complaint.

After Blankenship, the Ohio General Assembly, seeking to egislate the procedure for suing an employer for an intentional tort, enacted Ohio Revised Code Section 4121.80. In B~, the upreme Court held that Section 4121.80 was unconstitutional. Thedecision, however, did not overrule Blankenshin or preclude anintentional tort claim against an employer. In B~, the Court expressly "reaffirm[ed] our prior holding in Blankenshi~, ~a,and hold that a cause of action brought by an employee alleging intentional tort by the employer in the workplace is not preemptedby [the workers' compensation laws]." 61 Ohio St.3d at 635.

Subsequent to the ~d decision, courts recognized thatan employee can sue his employer for an intentional tort. InD~v. NLO, Inc., 811 F.

Supp. 1271 (S.D. Ohio, 1992), the court observed:

> "...the Ohio Supreme Court has held Ohio Revised Code Section 4121.80 to be unconstitutional. Brady v Safety-Kleen C~, 61 Ohio St.3d 624, 576 N.E.2d 722 (1991). However, the intentional tort exception to workers' compensation law was not abandoned; rather, the Ohio Supreme Court inbrady reaffirmed its decision in Blankenship to allow an employee to sue his employer for an intentional tort. Id. 61 Ohio St.3d at 635, 576 N.E.2d at 722." 811 F. Supp. at 1277, fn. 5.

Clearly, the B~ decision did not foreclose an employee'5 Blankenshi~ claim for an intentional tort against his employer. At the time the complaint was drafted, Ohio Revised Codesection 4121.80 had not been declared unconstitutional.

Consequently, the complaint referred to that section in settingout an intentional tort claim against General Motors.The subsequent holding in B~ precludes reliance on that statute,but does not justify dismissal of the intentional tort claim asserted in the eleventh cause of action. B~, while declaring the statute unconstitutional, held that such claims remain valid under Ohio law. Accordingly, the court should not follow the Magistrate'5 recommendation to dismiss the eleventh

cause of action.

In sum, the Court should not adopt the Magistrat~'5 recommendation that a summary judgment be granted with respect to certain claims set out in the complaint Defendant General Motors Corporatio~'5 Motion for Summary Judgment should be denied in its entirety.

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